

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

ARTISANS' BANK, )  
 ) C.A. No. K10L-03-090 JTV  
Plaintiff, )  
 )  
v. )  
 )  
CHASE ALEXA, LLP, a Delaware )  
Limited Liability Company, )  
 )  
Defendant. )

*Submitted: January 14, 2011*  
*Decided: April 21, 2011*

Brian J. McLaughlin, Esq., Monzack, Mersky, McLaughlin & Browden, Wilmington, Delaware. Attorney for Plaintiff.

Alisa E. Moen, Esq., Blank Rome, Wilmington, Delaware. Attorney for Defendant.

*Upon Consideration of Defendant's*  
*Motion to Vacate a Default Judgment*  
**DENIED**

**VAUGHN, President Judge**

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**ORDER**

Upon consideration of defendant Chase Alexa, LLC's motion to vacate a default judgment, plaintiff Artisans' Bank's opposition thereto, and the record of the case, it appears that:

1. The defendant executed a note and mortgage to the plaintiff on January 5, 2006 for \$3,000,000. The validity and terms of the note and mortgage are not in dispute. A dispute does exist, however, concerning the validity of and amounts owed under a series of subsequent modifications made to the original note. The issues relating to the dispute are being litigated in a separate action in this court. In that action, the defendant and two individual guarantors have filed an answer with defenses and counterclaims.

2. On October 25, 2010, six months after service of process and after the expiration of extensions of the time to answer, the plaintiff took default judgment because of the defendant's failure to move, answer, or otherwise respond to the complaint. The amount of the judgment includes principle of \$3,165,047.60, plus interest, late charges and costs. Two days later, on October 27, 2010, the defendant filed a motion to stay this mortgage foreclosure action. That motion was denied by a Commissioner.

3. The defendant now moves to vacate the default judgment under Rule 60(b)(1). A motion to set aside a default judgment is addressed to the sound

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discretion of the court.<sup>1</sup> To prevail the movant must establish: (1) mistake, inadvertence, surprise or excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow for a different outcome to the litigation; and (3) that substantial prejudice will not be suffered by the non-moving party.<sup>2</sup>

4. In support of the motion, the defendant contends that: (1) the amount of the judgment is being contested in the aforementioned separate action, and therefore, this action is intertwined with the separate action, and foreclosure on the property is premature; and (2) the defendant, in fact, did respond by filing a motion to stay. As mentioned, the defendant has raised defenses and counterclaims in the separate action. The counterclaims include allegations of fraud committed by the plaintiff.

5. The plaintiff contends that the defendant's conduct fails to satisfy the requirements of Rule 60(b)(1). It contends that the defendant has failed to establish that its conduct was that of a reasonably prudent person under the circumstances; that the defendant filed a detailed response in the separate action and made an informed, deliberate, and intended decision not to file a response in this mortgage foreclosure action;<sup>3</sup> that the only permitted defenses in a foreclosure action are satisfaction,

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<sup>1</sup> *Mendiola v. State Farm Mut. Auto Ins. Co.*, 2006 WL 1173898, at \*2 (Del. Super. Apr. 27, 2006); *Cohen v. Brandywine Raceway Ass'n.*, 238 A.2d 320, 325 (Del. Super. 1968).

<sup>2</sup> *Mendiola*, 2006 WL at \*2.

<sup>3</sup> I express no opinion herein regarding the defendant's intent.

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payment, and avoidance; that the defenses which the defendant wishes to assert in this action are set-offs and permissive counterclaims; that the defendant does not dispute the terms of the original note and mortgage and in Delaware a lender has the right to proceed on its remedies concurrently. Therefore, the plaintiff contends, it can concurrently pursue this *scire facias sur* mortgage action and a separate personal action on the debt.

6. After considering the parties contentions, I am not persuaded that the defendant has established mistake, inadvertence, surprise or excusable neglect. No specific reason for not filing an answer seems to have been identified by the defendant. The filing of the motion for a stay has no significant legal weight since only the filing of a motion under Rule 12 serves as a substitute for the filing of an answer. In addition, I agree with the plaintiff that only compulsory set-offs or counterclaims can be asserted in a *scire facias sur* mortgage proceeding, and I am not persuaded that the defenses and counterclaims averred in the separate action regarding the subsequent modifications or the guarantees are compulsory to the plaintiff's writ of *scire facias*.<sup>4</sup> My conclusion is that the judgment should not be disturbed at this time and that the plaintiff should not be further delayed in proceeding with sale of the property, if it wishes to do so. If the proceeds from a foreclosure sale exceed any amount admitted by the defendant to be due under the terms of the mortgage being foreclosed upon, the defendant may file an appropriate motion then to address the distribution of such disputed proceeds.

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<sup>4</sup> *Gordy v. Preform Bldg. Components, Inc.*, (Del. Super. 1973).

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7. Therefore, the motion to vacate the judgement is *denied*.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

JTVJr:dfm

cc: Prothonotary  
Order Distribution  
File